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In the Supreme Court of the United States

CHEVRON U.S.A. INC., PETITIONER

v.

MARIO ECHAZABAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.*, permits an employer to refuse to hire an individual because his performance of the job will, as a result of his disability, pose a direct threat to his own health or safety.

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INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission (EEOC) enforces Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.*, with respect to private employers and is authorized to issue regulations under that Title. This case concerns whether Title I authorizes an affirmative defense for cases in which an individual will pose a direct threat to the health or safety of that individual. The court of appeals in this case invalidated the EEOC regulations that recognize such a defense. 29 C.F.R. 1630.2(r), 1630.15(b)(2). The EEOC is, of course, interested in the validity of its regulations. The United States filed an amicus curiae brief in this case at the petition stage in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). A "qualified individual with a disability" is a disabled individual "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). The ADA defines "discriminate" to include "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6).[1]

A section entitled "Defenses" clarifies that "[i]t may be a defense to a charge of discrimination under [the ADA] that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). That section specifically provides that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b). The ADA defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation." 42 U.S.C. 12111(3).

[1] The EEOC's Title I regulations define "[q]ualification standards" to mean "the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by a covered entity as requirements which an individual must meet in order to be eligible for the position held or desired." 29 C.F.R. 1630.2(q).

The ADA requires the EEOC to issue regulations to carry out the provisions of Title I, and the EEOC, following public notice and comment, has issued regulations pursuant to that mandate, 56 Fed. Reg. 35,726 (1991). Consistent with the statutory text, the regulations provide that an employer may defend against a charge that a qualification standard improperly screens out a disabled individual by showing that the standard is "job-related and consistent with business necessity, and such performance cannot be accomplished with reasonable accommodation." 29 C.F.R. 1630.15(b)(1). In elaborating on that defense, the regulations state that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace." 29 C.F.R. 1630.15(b)(2). The regulations define direct threat to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r).

2. Respondent Mario Echazabal first began working at an oil refinery owned by petitioner Chevron U.S.A., Inc. in 1972. Employed by various maintenance contractors, respondent worked continuously for petitioner as a laborer, helper, pipefitter, and as a worker on the fire watch (excluding one period between December 1975 and January 1979, when he was not working at the refinery). Respondent worked primarily in the refinery's coker unit. Pet. App. 2a.

In 1992, respondent applied to work directly for petitioner in the refinery's coker unit. Petitioner made respondent an offer of employment contingent upon his passing a physical examination. An examination by petitioner's physician revealed that respondent's liver was releasing certain enzymes at a higher than normal level. Based on that examination,

petitioner concluded that respondent's liver might be damaged by exposure to the solvents and chemicals present in the coker unit. Petitioner therefore rescinded the job offer. Pet. App. 2a.

After learning of the enzyme test results, respondent consulted several doctors. He was eventually diagnosed with asymptomatic, chronic active Hepatitis C, a viral infection of the liver. Pet. App. 3a, 35a. Respondent continued to work throughout the refinery (including in the coker unit) as an employee of petitioner's maintenance contractor. *Id.* at 2a.

In 1995, respondent again applied to petitioner for a position as a plant helper in the coker unit. Petitioner again made respondent an offer contingent on a physical examination. Pet. App. 3a, 35a. Petitioner's examining physician concluded that further exposure to chemicals and solvents like those used in the coker unit would seriously endanger respondent's health and, in certain circumstances, could be fatal. *Id.* at 38a; C.A. E.R. 81-82. Petitioner's medical director agreed that respondent could not work in the coker unit without risk to his own health. Pet. App. 38a. Based on the those findings, petitioner refused to hire respondent. *Id.* at 3a. Petitioner also instructed its maintenance contractor to ensure that respondent was not exposed to solvents and chemicals; and, as a result, respondent could no longer work at the refinery. *Ibid.*

3. a. Respondent brought this action in state court alleging, among other things, that petitioner and its maintenance contractor had discriminated against him on the basis of a disability, in violation of the ADA. Pet. App. 3a. Petitioner removed the case to the United States District Court for the Central District of California. *Id.* at 32a. The district court granted summary judgment in favor of petitioner on all of respondent's claims. *Id.* at 32a-57a. On the ADA claim, the district court found that petitioner's refusal to hire respondent was lawful because, as a result of respondent's liver condition, his working in the refinery would have posed a direct threat to his health. *Id.* at 46a-52a. The district court stayed the proceedings against the maintenance contractor, and certified several issues for appeal, including the propriety of the grant of summary judgment on the ADA claim. *Id.* at 3a-4a.

b. The United States Court of Appeals for the Ninth Circuit reversed. Pet. App. 1a-18a. The court first held that the ADA does not provide an affirmative defense permitting an employer "to refuse to hire an applicant on the ground that the individual, while posing no threat to the health or safety of other individuals in the workplace, poses a direct threat to his own health or safety." *Id.* at 5a. The court found the language of the ADA "dispositive" of that question. *Id.* at 6a. The court noted that the statutory language provides that an employer may impose, as a qualification standard, a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Ibid.* (quoting 42 U.S.C. 12113(b)). Relying on the maxim of statutory construction *expressio unius est exclusio alterius*, the court reasoned that, "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense." *Id.* at 6a-7a. The court accordingly invalidated the EEOC's regulations recognizing a threat-to-self defense. 29 C.F.R. 1630.2(r), 1630.15(b)(2).[2]

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[2] Because the Ninth Circuit invalidated the EEOC's regulations, the court of appeals did not address the EEOC's argument, set forth in a brief as amicus curiae, that the district court erred in granting petitioner summary judgment on the direct threat defense. The EEOC urged that "a reasonable jury could find that [petitioner] failed to consider the current medical knowledge and the best available objective evidence on [respondent's] condition, erred in concluding that [respondent] would have posed a direct threat, and ultimately failed to base its direct threat deter-

The court of appeals also addressed petitioner's contention that, "even if the direct threat provision does not provide it with a defense to its actions," respondent, "because of the risk of damage to his liver, * * * is not 'otherwise qualified' to perform the job at issue." Pet. App. 14a. The court acknowledged that an individual who, because of his disability, is unable to perform the "essential functions of the employment position that such individual holds or desires" (42 U.S.C. 12111(8)) is not a "qualified individual" (42 U.S.C. 12112(a)) under the ADA and, therefore, is not protected by the statute. Pet. App. 14a. In this case, however, the court explained, there is no evidence "that the risk [respondent] allegedly poses to his own health renders him unable to perform [the job] duties." *Id.* at 17a.

c. Judge Trott dissented, calling the majority's decision a "Pickwickian" ruling that "leads to absurd results." Pet. App. 23a. Judge Trott both disagreed with the majority's conclusion that respondent is a "qualified individual" and noted that "[petitioner] has a defense to this action, known as the 'direct threat' defense." *Id.* at 22a. He stressed that the "EEOC's implementing regulations, authorized by Congress, defin[e] a 'direct threat' to mean 'a significant risk of substantial harm to the health or safety of the individual * * * that cannot be reduced by reasonable accommodation.'" *Ibid.* (quoting 29 C.F.R. 1630.2(r)). Judge Trott would have deferred to the EEOC's implementing regulations because "the EEOC has rationally and humanely spoken." *Id.* at 22a.

SUMMARY OF ARGUMENT

I. A. The court of appeals erred in invalidating the EEOC's threat-to-self regulations. Those regulations were

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mination on a reasonable medical judgment." EEOC C.A. Br. 9. That argument would remain available in the event of a remand.

issued pursuant to the ADA's specific grant of rulemaking authority and are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Congress has not "directly spoken to the precise question" whether an employer may impose a qualification standard that requires an individual to be able to perform a job without posing a direct threat to his own health or safety. *Id.* at 842. The ADA permits an employer to establish a "qualification standard[]" that screens out disabled persons if the standard is "job-related and consistent with business necessity." 42 U.S.C. 12112(b)(6), 12113(a). The Act further specifies that such a qualification standard may "include" a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. 12113(b). Because the statutory text and structure plainly indicate that Congress established a threat-to-others qualification standard as only one example of a permissible qualification standard, the court of appeals erred in invalidating the EEOC's recognition of a closely related threat-to-self defense.

B. The EEOC's regulations are reasonable. The EEOC's recognition of a threat-to-self defense reflects an employer's legitimate interest in requiring that an individual's employment not pose a significant risk of injury or death to the individual. That requirement is both "job-related" and "consistent with business necessity." 42 U.S.C. 12112(b)(6), 12113(a). A threat-to-self defense also comports with judicial precedent under the Rehabilitation Act of 1973, and the EEOC's regulations interpreting that Act. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1421-1422 (9th Cir. 1985); *Bentivegna* v. *United States Dep't of Labor*, 694 F.2d 619, 621-623 (9th Cir. 1982); 29 C.F.R. 1613.702(f) (1979). At the same time, the EEOC's regulations guard against paternalistic employment decisions based on a generalized notion that individuals with certain disabilities pose a threat to self; the regulations

require the employer to prove a significant risk of imminent harm based on an individualized and objective assessment of the risk. 29 C.F.R. 1630.2(r); *id.* Pt. 1630, App. § 1630.2(r).

II. Although the court of appeals erred in invalidating the EEOC's regulations, it correctly determined that respondent is a "qualified individual" because respondent could "perform the essential functions of the employment position" that he sought. 42 U.S.C. 12111(8), 12112(a). Indeed, respondent successfully performed the duties of a plant helper for over 20 years as a contractor's employee in petitioner's coker unit. Once a plaintiff meets his burden of showing that he can perform the essential functions of a job, he does not bear the additional burden of showing that he would not pose a direct threat to the health and safety of himself or others. The Act clearly denotes valid qualifications standards, in general, and the threat-to-others provision, in particular, as "defenses" available to employers. 42 U.S.C. 12112(b)(6), 12113(a). Employers naturally bear the burden in establishing those defenses. Because the regulatory threat-to-self provision, like the statutory threat-to-others standard, is a defense, the EEOC has properly allocated the burden of proof to the employer.

ARGUMENT

I. THE EEOC'S REGULATORY THREAT-TO-SELF DEFENSE IS A VALID INTERPRETATION OF THE ADA

A. The EEOC's Threat-To-Self Regulations Are Entitled to *Chevron* Deference

Title I of the ADA prohibits an employer from "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual

with a disability or a class of individuals with disabilities *unless* the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. 12112(b)(6) (emphasis added). The statute clarifies that "[i]t may be a defense to a charge of discrimination" if a challenged qualification standard or criterion "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." 42 U.S.C. 12113(a). The ADA specifies that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," 42 U.S.C. 12113(b), and defines "direct threat" in parallel terms, see 42 U.S.C. 12111(3).

The EEOC has interpreted those provisions to permit an employer to impose a qualification standard that screens out not only individuals who pose a direct threat to the health or safety of other individuals in the workplace but also individuals who pose such a threat to their own health or safety. Specifically, the EEOC has issued a regulation that provides that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety of *the individual* or others in the workplace." 29 C.F.R. 1630.15(b)(2) (emphasis added). Another EEOC regulation defines "direct threat" as a "significant risk of substantial harm to the health or safety of *the individual* or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. 1630.2(r) (emphasis added).

The EEOC promulgated those regulations through notice-and-comment rulemaking, see 56 Fed. Reg. 35,726 (1991), pursuant to an express delegation of authority to promulgate regulations to "carry out" the provisions of Title I of the ADA. 42 U.S.C. 12116. In delegating that authority to the

EEOC, Congress contemplated that the EEOC's regulations would "have the force and effect of law." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 82 (1990); S. Rep. No. 116, 101st Cong., 1st Sess. 43 (1989) (same). The EEOC's regulatory interpretation is therefore entitled to deference in accordance with *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984).

As this Court recently reaffirmed, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). It is "fair to assume" that "Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure," such as the notice-and-comment rulemaking that the EEOC undertook in this case. *Id.* at 2172. Cf. *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 479 (1999) (reserving the question whether the EEOC's regulation interpreting the term "disability" is entitled to *Chevron* deference because that term is defined in other provisions of the ADA over which the EEOC has not been delegated rulemaking authority). Because the EEOC's regulations here interpret provisions over which the ADA expressly grants the EEOC rulemaking authority, the court of appeals was "obliged to accept the [EEOC]'s position if Congress has not previously spoken to the point at issue and the [EEOC]'s interpretation is reasonable." *Mead*, 121 S. Ct. at 2172 (citing *Chevron*, 467 U.S. at 842-845).

B. The ADA's Text and Structure Do Not Foreclose A Threat- To-Self Defense

1. The ADA does not speak directly to the validity of a threat-to-self defense, but the Act's text and structure support, rather than foreclose, such a defense. The ADA sets forth a general defense for "qualification standards" or "other selection criteria" that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a); see 42 U.S.C. 12112(b)(6) (excluding such a qualification standard and selection criteria from the definition of discrimination). The statute specifies that a qualification standard "may *include* a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. 12113(b) (emphasis added). The Act does not state that this requirement is the only permissible qualification standard concerning workplace threats to health or safety. To the contrary, Section 12113(a) provides a general defense for job-related qualification standards and selection criteria that are consistent with business necessity, and Section 12113(b) employs words of inclusion ("may include") when specifying a threat to others as an example of a permissible qualification standard.

Nothing in Title I of the ADA forecloses a qualification standard or selection criterion that requires that an individual not a pose a direct threat to his own health or safety. Rather, both the text and structure of the ADA leave ample room for the EEOC to issue regulations that define additional qualification standards that are job-related and consistent with business necessity. Under those circumstances, Congress has not "directly spoken to the precise question" whether an employer may require as a qualification standard that a prospective employee be able to perform the job he seeks without posing a direct threat to his own health or safety. *Chevron*, 467 U.S. at 842.

2. The court of appeals reached a contrary conclusion because of its mistaken reliance on the canon of statutory construction *expressio unius est exclusio alterius*. The court reasoned that the statutory specification of a "direct threat" defense for the risk of harm to others implicitly precludes a direct threat defense for the risk of harm to self. See Pet. App. 6a-7a.

That reasoning is flawed. The court of appeals' reliance on the *expressio unius* principle was inappropriate because the relevant statutory language is expressly inclusive. As noted above, the threat-to-others defense is included in the section of the ADA that sets forth a more general defense for qualification standards that are "job-related and consistent with business necessity." 42 U.S.C. 12113(a). The statutory language specifies one example of that defense—a permissible qualification standard may "include" a requirement that an individual not directly threaten the health or safety of other individuals in the workplace. 42 U.S.C. 12113(b). The use of the term "include" indicates that what follows is illustrative rather than exclusive. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) (explaining that "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.07, at 231 (6th ed. 2000); see, *e.g.*, *Pfizer Inc.* v. *Government of India*, 434 U.S. 308, 312 n.9 (1978); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 (1977).[3]

[3] The ADA's definition of "direct threat" to mean "a significant risk to the health or safety of others," 42 U.S.C. 12111(3), does not preclude the EEOC from using that term to describe another, similar example of the business necessity defense—a requirement that an employee's performance of the job not pose a significant risk to the health or safety of the employee himself. 29 C.F.R. 1630.2(r). The statutory definition of "direct threat" simply defines that term as it is used in the statute.

This Court has frequently cautioned against uncritical reliance on the *expressio unius* principle. See *Pauley* v. *Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *Burns* v. *United States*, 501 U.S. 129, 136 (1991); *Ford* v. *United States*, 273 U.S. 593, 612 (1927). Moreover, courts have noted that the canon is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R.* v. *ICC*, 902 F.2d 66, 69 (D.C. Cir.), cert. denied, 498 U.S. 985 (1990). Because it relies on an inference rather than a direct statement, the canon "can rarely if ever be the 'direct[]' congressional answer required by *Chevron*." *Ibid.* See also *Martini* v. *Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1343 (D.C. Cir. 1999) (*expressio unius* maxim "is simply too thin a reed to support the conclusion that Congress has clearly resolved [the] issue"), cert. dismissed, 528 U.S. 1147 (2000).[4]

[4] The court of appeals' reading of the statute also would lead to results that Congress could not have intended. The ADA's direct threat defense refers to "other individuals *in the workplace*." 42 U.S.C. 12113(b) (emphasis added). Under the court of appeals' holding, an employer could not defend a job-related qualification standard based on direct threats to third parties *outside the workplace*. Pet. App. 6a-7a; see also *Morton* v. *United Parcel Serv., Inc.*, No. 99-17447, 2001 WL 1518106, at *7 (9th Cir. Nov. 30, 2001) (direct threat defense does not apply where "asserted threat went * * * to the general public"). However, nothing indicates that Congress's concern with health or safety risks posed by an individual's job performance was limited to persons in the workplace. See S. Rep. No. 116, *supra*, at 27 ("It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety *of others* or poses a direct threat to *property*.") (emphasis added); accord H.R. Rep. No. 485, *supra*, Pt. 2, at 56. Rather, Congress provided a general defense for any qualification standard that is shown to be "job-related" and "consistent with business necessity." 42 U.S.C. 12112(b)(6), 12113(a).

C. The ADA's Legislative History Likewise Does Not Foreclose A Threat-To-Self Defense

1. The ADA's legislative history does not reveal a congressional intent to preclude the EEOC's interpretation. As the court of appeals acknowledged (Pet. App. 9a), the House Report recognizes that an employer may require a candidate to "undergo[] a post-offer, pre-employment medical examination." H.R. Rep. No. 485, *supra*, Pt. 2, at 73. The Report elaborates that, although the employer may not exclude the candidate "solely on the basis of an abnormality on an x-ray," "if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm." *Ibid.*; see also *ibid.* (recognizing physicians should examine "the effects of the disability *on the individual being considered*") (emphasis added). Congress thus assumed that an employer, when determining whether to hire a disabled individual, could consider substantial job-related risks to the individual's *own* health or safety.

2. In invalidating the EEOC's regulations, the court of appeals stated that, when the term "direct threat" was used in the "various committee reports" and "floor debate," there was no explicit reference to "threats to the disabled person himself." Pet. App. 7a-8a. That reasoning, however, applies to the legislative history the same erroneous *expressio unius* analysis that the court of appeals applied to the statutory language. As discussed above, that principle is not applicable to the text of the ADA. It is particularly inappropriate to apply the *expressio unius* canon to the Act's legislative history, because "the language of a statute * * * is not to be regarded as modified by examples set forth in the

legislative history." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990) (not reasonable to assume that Congress intends a "list of examples" in legislative history to be "exhaustive"). In any event, the references in the legislative history to the direct threat defense are *not* limited to risks to persons in the workplace. See note 4, *supra*.

The court of appeals also relied upon a floor statement made by Senator Kennedy, one of the ADA's sponsors. Pet. App. 8a-9a. In those remarks, Senator Kennedy stated that, because "the ADA specifically refers to health and safety threats to others," "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." 136 Cong. Rec. S9684-03, S9697 (daily ed. July 13, 1990). "For example," Senator Kennedy explained, "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed." *Ibid.*

"The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), and such remarks certainly do not provide the requisite clarity to foreclose an agency's reasonable interpretation of a statute's text. In any event, the EEOC's interpretation is consistent with Senator Kennedy's stated concern about paternalistic employment practices. See p. 21, *supra* (explaining that the EEOC's regulations do not permit an employer to base a threat-to-self defense on "[g]eneralized fears about risks from the employment environment," 29 C.F.R. Pt. 1630, App. § 1630.2(r)).

D. The EEOC's Threat-To-Self Regulations Reflect A Reasonable Interpretation Of The ADA

1. *A qualification standard that ensures that an individual's job performance will not directly threaten the individual's health and safety is job-related and consistent with business necessity*

Because Congress has not "directly addressed the precise question" at issue, the EEOC's threat-to-self regulations are valid so long as they constitute a "reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 843, 844. The EEOC reasonably has concluded that an employer's qualification requirement that an individual's employment not pose a significant risk of seriously injuring or contributing to the death of the individual is both job-related and consistent with business necessity. Maintaining a safe workplace is itself a business necessity.[5]

In the first place, ensuring worker safety reduces injuries and the resulting absences of critical employees. When there is a high probability that an employee will suffer significant injury or death in the near future because of his

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[5] Like the ADA, Title VII permits employment practices that are job-related and "consistent with business necessity." 42 U.S.C. 2000e-2(k). "Measures demonstrably necessary to meeting the goal of ensuring worker safety are * * * deemed to be 'required by business necessity' under Title VII." *Fitzpatrick* v. *City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993); see also *Smith* v. *City of Des Moines*, 99 F.3d 1466, 1472 (8th Cir. 1996) (applying business necessity defense under the Age Discrimination in Employment Act and noting employer's "legitimate interest in determining whether its employees can perform [job] duties safely."). This Court also has recognized under Title VII that business necessity may justify an employment practice "shown to be necessary to safe and efficient job performance." *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977); see also *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979) (recognizing a business's "legitimate employment goals of safety and efficiency").

performance of the job, there is necessarily a related risk that the employee will miss work due to injury. In that event, the employer will likely sustain losses in efficiency and productivity due to the disruption of its operations and the need to find a replacement and retrain a new worker. See Haig Neville, 40 Industrial Management, *Workplace accidents: they cost more than you think* 7 (Jan.-Feb. 1998) (workplace injuries have "immeasurable costs of lost production and efficiency on a company-wide basis"); accord Valerie Overheul, 70 Occupational Health and Safety, *20 Years of Safety* 70 (June 2001); David W. Wilbanks, 63 Occupational Hazards, *Common Safety Myths* 13 (Oct. 2001).

Likewise, serious workplace injuries pose other unique costs on employers in terms of the decreased morale and productivity of employees who may question the employer's commitment to workplace safety upon hearing that an employee has suffered injury, or even died, on the job. H. Neville, *supra*, at 8 ("[E]ffective safety standards in the workplace boost employee morale by conveying the message that the company cares enough about its people to protect their health and safety."). It may be difficult to convince fellow workers that an employee's injury or death resulted from a disability that posed a unique threat to that employee, rather than from general conditions that threaten the entire workforce. In addition, requiring an employer to hire an individual who is likely to suffer injury or death on the job could expose the employer to substantial litigation costs in defending tort suits and other claims based on allegations that the employer intentionally exposed the individual to danger or failed to avert the risk of harm to the individual. See V. Overheul, *supra*, at 70 ("Accidents and injuries * * * costs come in the form of property damage, lost

worker productivity, lowered morale, worker's compensation costs, and even lawsuits.").[6]

The combined effect of those costs to the employer is significant and the costs are similar to those incurred by an employer forced to hire a disabled individual who poses a direct threat to the health or safety of *others*. The ADA expressly recognizes that an employer has a defense in refusing to hire such an applicant. 42 U.S.C. 12111(3), 12113(b). Many of the same reasons underlying that defense—efficiency, productivity, employee morale, and litigation costs—also justify recognition of a parallel defense based on the threat to the worker. In both instances, a business has a legitimate interest in not hiring an individual whose job performance poses a "significant risk of substantial harm" to "health or safety." 29 C.F.R. 1630.2(r); see *EEOC* v. *AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1283 (7th Cir. 1995) ("It would seem that a requirement that employees not pose a significant safety threat in the workplace

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[6] In *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991), discussed pp. 22-23, *infra*, the Court left open the question whether state tort suits stemming from workplace lead exposures to fetuses would be preempted by Title VII, stating that "the pre-emption question is not before us." The Court observed that, because the employer in that case had complied with OSHA lead exposure standards and the employer had advised women of the risks, "[w]ithout negligence, it would be difficult for a court to find liability on the part of the employer." *Id.* at 208. Here, the direct threat defense is applicable only when the employee actually faces a significant risk of workplace injury or death. If the ADA is interpreted to require an employer to hire an employee who poses a threat to self, the employer may be able to use the ADA as a shield against a claim that the employer intentionally exposed the worker to a significant risk of injury or death. On the other hand, a court could conclude that the ADA sets only a floor and that the employer could and should comply with both the ADA and state law obligations to protect the worker from harm. At a minimum, the employer would incur substantial litigation expenses until the issue is resolved.

would obviously be consistent with business necessity: a safe workplace is a paradigmatic necessity of operating a business.").

As this Court has recognized, an "enquiry [into statutory meaning] may be guided by the examples" given in a statute. *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (holding that parody constitutes fair use under Copyright Act because it shares the same purpose as statutory examples of fair use). It follows, a fortiori, that an agency's interpretation of a statute to cover situations similar to those covered by the text is reasonable. Accordingly, in light of the similar purposes animating a threat-to-others defense and a threats-to-self defense, the EEOC acted reasonably in including the latter in its business necessity regulations.[7]

2. *The EEOC reasonably modeled its regulations the Rehabilitation Act of 1973*

As the EEOC noted when it promulgated its regulations, 56 Fed. Reg. at 35,730, interpreting the ADA to include a threat-to-self defense is consistent with judicial precedent under the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, as well as the EEOC's regulations interpreting that Act. The Rehabilitation Act protects only "qualified" individuals with disabilities but does not define that term. See 29 U.S.C. 793(a), 794(a). In implementing Section 501 of that Act,

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[7] The Occupational Safety and Health Act prohibits employers from exposing exmployees to "recognized hazards" that are likely to cause "death or serious physical harm," and imposes a "general duty" to furnish a safe workplace. 29 U.S.C. 654(a)(1). This general duty clause has not been interpreted as rquiring employees to refuse employment to job applicants, but it is not clear how this clause would apply to an employer that hires a worker who posed a clear threat to his or her own safety on the job. Uncertainty over the employer's regulatory obligations to such an employee, along with the uncertainty over potential tort liability, reinforces the reasonableness of the EEOC's adoption of a threat-to-self defense.

which is applicable to public employers, the EEOC promulgated a regulation that defined a "[q]ualified handicapped person" as a "handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health or safety *of the individual* or others." 29 C.F.R. 1613.702(f) (1979) (emphasis added); see also 43 Fed. Reg. 12,295 (1978) (rules of Civil Service Commission).

Moreover, at the time the ADA was passed, courts applying Sections 501 and 504 of the Act had recognized that an employer could consider the safety of the individual in setting qualification standards. *Mantolete* v. *Bolger*, 767 F.2d 1416, 1421-1422 (9th Cir. 1985); *Bentivegna* v. *United States Dep't of Labor*, 694 F.2d 619, 621-623 (9th Cir. 1982). Because the ADA is modeled on the Rehabilitation Act, it was reasonable for the EEOC to incorporate prior practice under the Rehabilitation Act into its regulations interpreting the distinct statutory language of the ADA. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632, 645 (1998); see also 42 U.S.C. 12201 (incorporating Rehabilitation Act standards into the ADA "[e]xcept as otherwise provided").[8]

[8] In 1992, Congress completed the circular relationship between the ADA and the Rehabilitation Act by amending the latter to require that the standards used to determine whether that Act has been violated "shall be the standards applied" under the ADA's employment provisions. 29 U.S.C. 791(g). The EEOC has proposed regulations under Section 501 to provide that concerns about risks to health and safety from an individual's job performance will be governed by the EEOC's direct threat regulations under Title I of the ADA. See 65 Fed. Reg. 11,019 (2000). It would be ironic indeed if the invalidation of the threat-to-self defense under the ADA would thus result in invalidating threat-to-self concerns under the Rehabilitation Act.

3. *The regulations do not foster paternalistic employment practices*

At the same time that the EEOC's regulations accommodate legitimate business concerns, they also protect disabled employees from "overprotective rules and policies" (42 U.S.C. 12101(a)(5)) based on "stereotypic assumptions" (42 U.S.C. 12101(a)(7)). Under the regulations, employers do not have license to "deny a person an employment opportunity based on paternalistic concerns regarding the person's health." Pet. App. 8a (quoting 136 Cong. Rec. at S9697 (statement of Sen. Kennedy)). As with the statutory threat-to-others defense, there is some danger that employers could incorporate the very stereotypes the ADA guards against into generalized conclusions that individuals with certain disabilities pose a threat to themselves. The EEOC's regulations prohibit such generalizations and paternalism in the application of *both* defenses by requiring the employer to prove "significant risk of substantial harm to the health or safety of the individual or others," based "on an individualized assessment" of the individual's ability to safely perform the essential functions of the job. 29 C.F.R. 1630.2(r); see *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 287 (1987) ("an individualized inquiry" protects disabled individuals "from deprivations based on prejudice, stereotypes, or unfounded fear").

The regulations further prohibit employment decisions based on "[g]eneralized fears about risks from the employment environment." 29 C.F.R. Pt. 1630, App. § 1630.2(r); see also 29 C.F.R. Pt. 1630, App. § 1630.15(a) (An employer may not base an employment decision on a generalized concern that hiring disabled persons "would cause the employer's insurance premiums or workers' compensation costs to increase."); accord S. Rep. No. 116, *supra*, at 28 ("It would also be a violation to deny employment to an applicant based on

generalized fears about the safety of the applicant or higher rates of absenteeism. By definition, such fears are based on averages and group-based predictions. This legislation requires *individualized* assessments.") (emphases added); accord H.R. Rep. No. 485, *supra*, Pt. 2, at 58.

Thus, in considering whether an individual poses a direct threat, the regulations require the employer to consider "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. 1630.2(r). The regulations require that those factors be assessed "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence," *ibid.*, and "not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes," 29 C.F.R. Pt. 1630, App. § 1630.2(r). See *Bragdon* v. *Abbott*, 524 U.S. at 649-652 (discussing direct threat defense under Title III of the ADA). In addition, by treating employer concerns about threat to self as a defense, the regulations appropriately place the burden of proof on employers. See pp. 25-27, *supra*.

For similar reasons, the court of appeals erred in relying on *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 202 (1991), for its conclusion that Congress intended the ADA to "allow all individuals to decide for themselves whether to put their own health and safety at risk." Pet. App. 10a. *Johnson Controls* held that an employer's policy prohibiting all women of child-bearing age from certain jobs that involve exposure to lead violates Title VII because the policy could not be justified as a bona fide occupational qualification (BFOQ). 499 U.S. at 207.[9]

[9] The Court in *Johnson Controls* observed that "[t]he business necessity standard is more lenient for the employer than the statutory BFOQ defense." 499 U.S. at 198. Because the court determined that the employer's fetal-protection policy was facially discriminatory and therefore had to be justified as a BFOQ, *id.* at 200, the Court did not decide whether the employer's policy would satisfy a business necessity defense.

The anti-paternalism principles recognized in that decision are consistent with, and indeed reflected in, the EEOC's threat-to-self defense regulations. As discussed above, the EEOC's regulations do not permit an employer to adopt policies, rooted in "general subjective standards," that "explicitly discriminate" against a class on the basis of a protected trait. 499 U.S. at 197, 201. Rather, the regulations require an employer to conduct an "individualized" and "objective" assessment of whether the individual's performance of the job raises a "significant risk of substantial harm to the health or safety of the individual." 29 C.F.R. 1630.2(r). That inquiry necessarily focuses on a particular individual's ability to perform the job safely, an inquiry that was missing from the employer's policy in *Johnson Controls*. 499 U.S. at 207 (noting that there was no "factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved") (internal quotation marks omitted). Accordingly, the type of generalized and paternalistic employment policy invalidated in *Johnson Controls* would not satisfy the EEOC's direct threat regulations. The EEOC's regulations are thus eminently reasonable, and the court of appeals erred in invalidating them.[10]

[10] The reasonableness of the EEOC's threat-to-self regulations is not undermined by the fact that the Department of Justice has issued regulations under the direct threat provision of Title III of the ADA, 42 U.S.C. 12182(b)(3), that do not refer to threats to self. See 28 C.F.R. 36.208(b). Title III protects against disability-based discrimination in public accommodations. By contrast, Title I authorizes a direct threat defense as a type of employment "qualification standard" that is job-related and consistent with business necessity. Such a business necessity defense, which does not exist under Title III, recognizes that an employer has a legiti-

II. RESPONDENT IS A "QUALIFIED INDIVIDUAL" UNDER THE ADA

A. Respondent Established That He Was A Qualified Individual

Although the court of appeals erred in invalidating the EEOC's direct threat regulations, it correctly determined that respondent is a "qualified individual" within the meaning of Title I of the ADA. Pet. App. 14a-18a. Title I prohibits an employer from discriminating against a "qualified individual with a disability." 42 U.S.C. 12112(a). To be a "qualified individual," an individual must be able, "with or without reasonable accommodation, [to] perform the essential functions of the employment position." 42 U.S.C. 12111(8).

The EEOC's regulations define "essential functions" to mean "the fundamental job duties of the employment position the individual with a disability holds or desires." 29 C.F.R. 1630.2(n)(1); see also S. Rep. No. 116, *supra*, at 26 ("The phrase 'essential functions' means job tasks that are fundamental and not marginal."); H.R. Rep. No. 485, *supra*, Pt. 2, at 55 (same). The EEOC also has concluded that "[t]he determination of whether an individual * * * is qualified is to be made at the time of the employment decision." 29 C.F.R. Pt. 1630, App. § 1630.2(m); accord S. Rep. No. 116, *supra*, at 26; H.R. Rep. No. 485, *supra*, Pt. 2, at 55. The plaintiff bears the burden of demonstrating his ability to perform the essential functions of the job at issue. See, *e.g.*, *Webner* v. *Titan Distribution, Inc.*, 267 F.3d 828, 833 (8th Cir. 2001).

In this case, respondent met his burden of showing that he is a qualified individual under the ADA. Indeed, respondent's own work history demonstrates that he satisfies the qualified individual standard. There is undisputed evidence that respondent was capable of performing the essential duties of the plant helper position in the coker unit and, in fact, did so successfully as a contractor's employee for over 20 years (the latest three after respondent's doctors first diagnosed respondent's liver condition). C.A. E.R. 328-329; see also Pet. App. 17a (Petitioner "has never contended that the risk [respondent] allegedly poses to his own health renders him unable to perform [job] duties.").

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mate interest in hiring workers whose performance on the job is not compromised by a condition that carries with it a significant risk of substantial, imminent harm to the health or safety of the worker.

B. The EEOC's Regulations Properly Place On The Employer The Burden Of Showing That An Employee Would Pose A Direct Threat To The Health Or Safety Of Himself Or Others

1. As previously stated, the ADA provides that, if an employer uses a qualification standard that screens out or tends to screen out an individual with a disability, the employer must demonstrate that the standard is job-related and consistent with business necessity. 42 U.S.C. 12112(b)(6). Consistent with that allocation of the burden of proof, the ADA denotes a valid qualification standard as a "defense" and includes it in 42 U.S.C. 12113 under the heading "Defenses." Under that same heading of "Defenses," the ADA specifically permits "a requirement that an individual shall not pose a direct threat to the health and safety of other individuals in the workplace." 42 U.S.C. 12113(b).

The statutory text and structure of the ADA support the treatment of direct threat concerns as a defense with the burden on the employer. If the employee had the burden of disproving any threat to self or others to establish qualified individual status, the business necessity and direct threat provisions would be rendered superfluous. They would simply reiterate a requirement already found in the threshold definition of "qualified individual." General principles of

statutory interpretation prohibit such a construction. See, *e.g.*, *Dunn* v. *CFTC*, 519 U.S. 465, 472 (1997) (legislative enactments "should not be construed to render their provisions mere surplusage"). A statutorily-designated "*defense*" for threats to others cannot be made part of a plaintiff's case in chief without turning the Act on its head. In light of the EEOC's decision to interpret the business necessity defense to include a threat-to-self defense, the burden for meeting that defense likewise rests on the employer. The legislative history supports the same result.[11]

2. To be sure, there may be some instances in which the employer's qualification standard is so integral to a job that there will be substantial overlap between the issue whether an individual is qualified and whether the individual poses a threat to health and safety. For example, jobs in which safety concerns are paramount, such as an airline pilot or a firefighter, may demand an ability to perform the job safely, and so the individual's proof that he can perform essential job functions will necessarily implicate issues of safety. See 29 C.F.R. Pt. 1630, App. § 1630.2(n) (firefighter who could not "carry an unconscious adult out of a burning building" would not be qualified to perform the essential functions of the position); cf. *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 578-580 (1999) (Thomas, J., concurring). But it is not *always* true that an ability to perform a job safely is inextricably tied to the performance of essential job functions. This is a case in point. As noted, respondent performed this job successfully for decades. Although petitioner may have a valid threat-to-self defense, respondent can perform the essential tasks of the job. In other words, respondent may be disqualified by a valid qualification standard, but he is not unqualified to perform the job tasks at issue.

A contrary reading of the statute, incorporating the absence of a threat to self or others as a prerequisite for every job, would ignore Congress's choice to make qualification standards in general, and threat-to-others concerns in particular, a "defense" to liability. Congress's choice to label those provisions "[d]efenses," and the EEOC's parallel decision to create a threat-to-self defense, reflect the fact that the employer, not the employee, is in the superior position to prove whether the absence of a threat to self or others is required by business necessity.[12]

3. In arguing that respondent is not a "qualified individual," petitioner relies (Pet. 18, 24) on the fact that, under the Rehabilitation Act, concerns about threats to self and others are considered in the determination whether a plaintiff is a "qualified" individual. See pp. 19-20, *supra*. That fact, how-

[11] See H.R. Rep. No. 485, *supra*, Pt. 3, at 42 (qualification standard that has discriminatory effect on disabled persons is unlawful "unless *the employer* can demonstrate that it is jobrelated and required by business necessity") (emphasis added); *id.* at 46 (an otherwise qualified applicant for a job "cannot be disqualified on the basis of a physical or mental condition unless *the employer* can demonstrate that the applicant's disability poses a direct threat to others in the workplace") (emphasis added).

[12] In *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 (1999), this Court noted the EEOC's view that, "when an employer would impose any safety qualification standard, however specific, tending to screen out individuals with disabilities, the application of the requirement must satisfy the ADA's 'direct threat' criterion." See 29 C.F.R. Pt. 1630, App. § 1630.15(b) and (c). The Court stated that the "[g]overnment's interpretation * * * might impose a higher burden on employers to justify safety-related qualification standards than other job requirements." 527 U.S. at 569-570 n.15. Whether or not the appropriate burden is that reflected in the direct threat provision of Section 12113(b), or some different standard under Section 12113(a), it is clear that the burden of proof rests with the employer. Moreover, in this case, the direct threat burden properly would apply in light of the EEOC's decision to frame the threat-to-self defense in direct threat terms and the clear parallelism between the statutory threat-to-others defense and the regulatory threat-to-self defense.

ever, does not preclude the EEOC's interpretation of the ADA. The Rehabilitation Act, unlike the ADA, does not include a separate defense section and so concerns about threats to self and others are addressed under the general rubric of whether an individual is qualified. The Rehabilitation Act thus permits an employer to set a qualification standard that excludes a disabled person when the standard is necessary to avert a significant risk to health and safety. See *Arline*, 480 U.S. at 287 n.16 ("A person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."). Moreover, at the time of the ADA's passage, courts and the EEOC recognized that the *employer* bore the burden on this issue.[13]

Congress in the ADA essentially codified that result, albeit under a modified statutory framework. See *Bragdon* v. *Abbott*, 524 U.S. at 649 ("The ADA direct threat provision stems from the recognition in *School Board of Nassau County* v. *Arline*, [*supra*], of the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks."); S. Rep. No. 116, *supra*, at 76 (citing *Arline* in discussing

[13] See *Mantolete*, 767 F.2d at 1421-1423; *Bentivegna*, 694 F.2d at 621-623; Federal Sector Equal Employment Law and Practice Ch. XIV, B(3)(f) and F(1)(f) (2001) (discussing EEOC's pre-ADA federal sector decisions under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791); see also H.R. Rep. No. 485, *supra*, Pt. 2, at 57, 74 (citing the *Mantolete* and *Bentivegna* decisions). Since the passage of the ADA, courts have not always been clear under the Rehabilitation Act as to which party bears the burden of showing a probability of substantial harm to the safety of the individual or others. Compare, *e.g.*, *Chandler* v. *City of Dallas*, 2 F.3d 1385, 1394 (5th Cir. 1993) (burden on employee), with *Chiari* v. *City of League City*, 920 F.2d 311, 315-317 (5th Cir. 1991) (burden on employer).

ADA's direct-threat defense); H.R. Rep. No. 485, *supra*, Pt. 2, at 76 (same); H.R. Rep. No. 485, *supra*, Pt. 3, at 34, 45 (same). By including in the ADA a *defense* for qualification standards that are job-related and consistent with business necessity and specifically defining that defense to include a direct threat principle, Congress made explicit what was already implicit in the Rehabilitation Act and made abundantly clear that under the ADA the burden for proving a direct threat defense rests with the employer.

* * * * *

In short, the court of appeals correctly held that respondent is a "qualified individual" under Title I of the ADA, but the court erred in invalidating the EEOC's regulations and precluding petitioner's defense that respondent's performance of the job posed a direct threat to his own health or safety. By addressing threat-to-self concerns as a regulatory defense to liability, the EEOC struck a proper balance between the rights of disabled individuals to work free of discrimination and employers' need to maintain a safe workplace. Under the EEOC's regulations, an employer need not hire an employee who poses a threat to self, but only if the employer demonstrates, on an individualized basis, a real threat to the employee's health. The decision below pretermitted that inquiry. The case should therefore be remanded for the proper application of the direct threat standard as set forth in the EEOC's regulations.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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